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Re Azizul Nizam bin Bidin; ex parte Solsis (M) Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D29NCC-4617–10 OF 2015
MOHD NAZLAN JC
25 JANUARY 2017

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Bankruptcy — Bankruptcy notice — Setting aside — Whether service of bankruptcy notice invalid — Whether actual physical service to judgment debtor required — Whether computation of 8% judgment interest accurate — Whether calculation of judgment interest resulted in an excess of amount — Whether bankruptcy notice ambiguous and uncertain — Whether defect in bankruptcy notice curable — Bankruptcy Act 1967 s 131

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This was an appeal by the judgment debtor ('JD') against the decision of the learned senior assistance registrar in dismissing the JD's application to set aside the judgment creditor's ('JC') bankruptcy notice. The JD contended that the bankruptcy notice was defective and invalid on the following grounds: (a) the service of the bankruptcy notice was invalid because the signature which purportedly acknowledged receipt appearing on the letter for service dated 7 January 2016 of the bankruptcy notice was not the JD's signature; (b) the computation of the 8% judgment interest from 9 November–31 December 2009 should have been in respect of a total of 53 days and not 22 days; and (c) the calculation of the judgment interest from 1 January–21 December 2012 resulted in an excess over the correct amount, given that the JC had used a computation of 366 days instead of one year. The JD had further asserted the service was invalid as the bankruptcy notice was served on his wife who signed the acknowledgment of service. However, the JC had filed an affidavit of service that averred to the fact that the JD signed on the letter, attaching the bankruptcy notice containing the date and time of acceptance of service. The JD took the position that the computation of interest in the bankruptcy notice was wrong, confusing and did not reflect the correct computation of interest as stated in the judgment.

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Held, dismissing the appeal and affirming the decision of senior assistant registrar:

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(1) Having evaluated the various affidavits, the averments made by the JD were of doubtful validity. Despite the JC's adherence to r 11 of the Bankruptcy Rules 1969 and averred clearly the fact of service made on the JD in person, the reply made by the JD was lacking in specificity and too tentative. The JD's averment that the signature seemed more like his wife's could not justifiably challenge the affidavit of service of the JC and

was thus a bare averment and could not be accepted. The JD merely focused on the identity of the person who signed the acknowledgment and there was no denial or dispute by the JD that the process server had visited his home, or that he had met the JD. Therefore, the averments by the process server on his meeting the JD at his home must be deemed admitted (see paras 10–13).

(2) A proper construction of r 109 of the Bankruptcy Rules 1969 does not require physical personal service. Thus, there was no necessity for a judgment debtor to sign and acknowledge receipt of service of the creditor's petition, or a bankruptcy notice. The non-denial by the JD of the visit by the process server meant that he was aware of the bankruptcy notice as the same would have been told to him by the process server, as averred by the affidavit of service. Thus, the fact that the JD argued that he did not sign the acknowledgement was thus immaterial. There was also no rebuttal by the JD to suggest that his wife did not subsequently apprise the JD of the bankruptcy notice. Based in the JD's averment that his wife could have signed the acknowledgement meant that his wife was, as to be naturally expected, residing with him at the same address. Hence, all arguments of the JD in respect of defective personal service of the bankruptcy notice were wholly unmeritorious and could not be sustained (see paras 15–16 & 19–20).

(3) The JD's argument that the bankruptcy notice was ambiguous and uncertain at best was not strongly grounded by law (see paras 26 & 29).

(4) The nature of the challenge was neither that the amount be set off against any counterclaim or cross demand nor that the amount being claimed was in excess of the amount actually due. As such, the JD was not subject to the requirement of giving notice disputing bankruptcy notice to the JC within seven days of service of the bankruptcy notice under s 3(1)(i) and (2)(ii) of the Bankruptcy Act 1967 (see para 33).

(5) No uncertainty can be said to have arisen from the understatement of the context of the bankruptcy notice. The understatement of the interest payable on the total amount actually due constituted only a formal defect curable by s 131 of the Bankruptcy Act 1967 as it was not objectively capable of misleading, perplexing or prejudicing the JD as to what was necessary for compliance with the bankruptcy notice (see para 41).

(6) The complaint in respect of the calculation of the judgment interest was too trivial or entirely misconceived. If indeed it was an error, which it was not, it would patently be a minor and mere formal defect. Whether or not it was an error, where in this case it was plainly not, it was patently minor and a mere formal defect. This would warrant the application of s 131 of the Bankruptcy Act 1967. It was an escapable conclusion that the action

by the JD to set aside the bankruptcy notice was plainly unmeritorious and could not succeed (see paras 43–44).

[Bahasa Malaysia summary

Ini adalah rayuan oleh penghutang penghakiman ('HP') terhadap keputusan penolong kanan pendaftar yang bijaksana dalam menolak permohonan HP untuk mengetepikan notis kebankrapan pemiutang penghakiman ('MP'). HP menegaskan bahawa notis kebankrapan itu adalah defektif dan tidak sah atas alasan-alasan berikut: (a) penyampaian notis kebankrapan adalah tidak sah kerana tandatangan bagi maksud mengakui penerimaan yang terdapat pada surat untuk penyampaian bertarikh 7 Januari 2016 berhubung notis kebankrapan bukanlah tandatangan HP; (b) pengiraan 8% faedah penghakiman dari 9 November–31 Disember 2009 sepatutnya berkaitan keseluruhan 53 hari dan bukan 22 hari; dan (c) pengiraan faedah penghakiman dari 1 Januari–21 Disember 2012 telah mengakibatkan lebihan berbanding jumlah yang betul, berdasarkan bahawa MH telah menggunakan pengiraan 366 hari dan bukan satu tahun. HP telah selanjutnya menegaskan penyampaian itu adalah tidak sah kerana notis kebankrapan itu telah disampaikan ke atas isterinya yang telah menandatangani pengakuan penyampaian itu. Walau bagaimanapun, MP telah memfailkan afidavit penyampaian yang menegaskan fakta bahawa HP telah menandatangani surat itu, dengan melampirkan notis kebankrapan yang mengandungi tarikh dan masa penerimaan penyampaian itu. HP mengambil kedudukan bahawa pengiraan faedah dalam notis kebankrapan itu salah, mengelirukan dan tidak menggambarkan pengiraan betul faedah sepertimana yang dinyatakan dalam penghakiman.

Diputuskan, menolak rayuan dan mengesahkan keputusan penolong kanan pendaftar:

(1) Setelah menilai pelbagai afidavit, penegasan yang dibuat oleh HP adalah mengenai keraguan kesahan. Walaupun pematuhan MP terhadap k 11 Kaedah-Kaedah Kebankrapan 1969 dan menegaskan dengan jelas fakta penyampaian yang dibuat ke atas HP tidak mempunyai pengkhususan dan terlalu tentatif. Penegasan HP bahawa tandatangan itu kelihatan lebih seperti isterinya tidak boleh mewajarkan mencabar afidavit penyampaian MP dan adalah oleh itu penegasan kosong dan tidak boleh diterima. HP hanya fokus kepada identiti orang yang menandatangani pengesahan itu dan tiada penafian atau pertikaian oleh HP bahawa penyampai proses berhubung mesyuaratnya HP dirumahnya mesti dianggap telah diterima (lihat perenggan 10–13).

(2) Pembinaan sebenar k 109 Kaedah-Kaedah Kebankrapan 1069 tidak menghendaki penyampaian peribadi secara fizikal. Oleh itu, tiada keperluan untuk penghutang penghakiman dan mengesahkan penerimaan penyampaian petisyen pemiutang, atau notis kebankrapan.

HP yang tidak menafikan lawatan oleh penyampai proses itu bermaksud bahawa dia meyedari tentang notis kebankrapan itu kerana perkara yang sama telah diberitahu kepadanya oleh penyampai proses itu, sepertimana ditegaskan oleh afidavit penyampaian. Oleh itu, fakta bahawa HP berhujah yang dia tidak menandatangani pengesahan itu dengan itu adalah tidak material. Juga tiada pematahan oleh HP untuk mencadangkan bahawa isterinya kemudiannya tidak memaklumkan HP tentang notis kebankrapan itu. Berdasarkan penegasan HP bahawa isterinya mungkin telah menandatangani pengesahan itu bermaksud bahawa isterinya adalah, sepertimana dijangkakan secara semula jadi, yang tinggal bersamanya di alamat yang sama. Justeru, semua hujah HP berkaitan penyampaian peribadi yang defektif berhubung notis kebankrapan keseluruhannya tidak bermerit dan tidak boleh dikekalkan (lihat perenggan 15–16 & 19–20).

(3) Hujah HP bahawa notis kebankrpan adalah taksa dan tidak pasti paling tidak adalah berdasarkan sepenuhnya oleh undang-undang (lihat perenggan 26 & 29).

(4) Sifat cabaran bukan jumlah penepian terhadap apa-apa tuntutan balas atau permintaan balas mahupun bahawa jumlah yang dituntut melebihi jumlah yang sebenarnya kena dibayar. Oleh itu, HP tidak tertakluk kepada keperuan memberikan notis mempertikaian notis kebankrapan kepada MP dalam tempoh tujuh hari penyampaian notis kebankrapan itu di bawah s 3(1)(i) dan (2)(ii) Akta Kebankrapan 1967 (lihat perenggan 33).

(5) Tiada kepastian boleh dikatakan telah timbul daripada kenyataan yang kurang benar berhubung konteks notis kebankrapan itu. Kenyataan yang kurang benar berhubung faedah yang kena dibayar ke atas keseluruhan jumlah yang sebenarnya kena dibayar hanya merupakan kecacatan formal yang boleh dipulihkan oleh s 131 Akta Kebankrapan 1967 kerana ia bukan bertujuan untuk mengelirukan, membingungkan atau menimbulkan prasangka terhadap HP berhubung apa yang perlu untuk pematuhan dengan notis kebankrapan itu (lihat perenggan 41).

(6) Aduan berkaitan pengiraan faedah penghakiman terlalu remeh atau disalah faham sepenuhnya. Jika sememangnya ia satu kesilapan, yang mana ia bukan, ia secara terang-terangan hanya suatu kecacatan yang dan kecil. Sama ada atau tidak ia suatu kesilapan, di mana dalam kes ini ia jelasnya bukan, ia secara terang-terangan hanya suatu kecacatan yang formal dan kecil. Ini mewajarkan permohnan s 131 Akta Kebankrapan 1967. Ia suatu kesimpulan yang boleh dielakkan bahawa tindakan oleh HP untuk mengetepikan notis kebankrapan jelas tidak mempunyai merit dan tidak boleh berjaya (lihat perenggan 43–44).]

Notes

For cases on setting aside bankruptcy notice, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3337–3339.

Cases referred to

AlliedBank (Malaysia) Bhd v Yau Jiok Hua [1998] 6 MLJ 1; [1998] 2 CLJ 33, HC (refd)
Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal [1991] 1 MLJ 426, SC (refd)
Ghazali bin Mat Noor v Southern Bank Berhad and four other appeals [1989] 2 MLJ 142, SC (refd)
J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177; [2000] 3 CLJ 104, CA (refd)
Khaw Siew Suan; Ex p Asia Commersial Finance (M) Bhd, Re [2001] 1 MLJ 101, HC (refd)
Kleinwort Benson Australia Ltd v Crowl (1988) 79 ALR 161; (1988) 165 CLR 71, HC (refd)
Lee Peak Sing: Ex p Malayan Banking Berhad (No 2), Re [2012] MLJU 1784; [2012] 3 CLJ 351, HC (refd)
Liew Choo; Ex p Chuah Teng Heng, Re [2016] MLJU 1836; [2016] 9 CLJ 598, HC (refd)
Lim Kim Guan, Ex p Four Seas Bank Ltd, Re [1991] 1 MLJ 330, HC (folld)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (folld)
Rengasamy Pillai v Comptroller of Income Tax [1970] 1 MLJ 233, PC (refd)
Salvarajoo a/l Palany v Export-Import Bank of Malaysia Berhad [2015] MLJU 389; [2016] 3 MLRH 358, HC (refd)
Siow Fook Keong v Lim Ean Chye [2015] MLJU 931, HC (refd)
Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304, SC (refd)

Legislation referred to

Bankruptcy Act [AUS] s 306(1)
Bankruptcy Act 1967 ss 3(1)(i), (2)(i), (2)(ii), 131, 133
Bankruptcy Rules 1969 rr 97, 109, 111

Azlan A Hamid (Rhiza & Richard) for the judgment debtor.
Douglas Chai (Douglas Chai Chambers) for the judgment creditor.

Mohd Nazlan JC:

INTRODUCTION

[1] This is an appellant/judgment debtor ('the JD')'s appeal against the decision of the learned senior assistant registrar given on 29 September 2016, dismissing the JD's application to set aside the respondent/judgment creditor

('the JC')'s bankruptcy notice dated 1 October 2015 ('bankruptcy notice'). I heard the appeal on 21 November 2016 and dismissed the same at the end of the hearing. This judgment contains the full reasons for my decision.

THE PRINCIPAL GROUNDS OF APPEAL

[2] This appeal by the JD, which is resisted by the JC, is premised on the principal contention that the bankruptcy notice is defective and invalid for the following grounds:

(a) the service of the bankruptcy notice is invalid because the signature which purportedly acknowledged receipt appearing on the letter for service dated 7 January 2016 of the bankruptcy notice is not the signature of the JD;

(b) the computation of the 8% judgment interest from 9 November–31 December 2009 should have been in respect of a total of 53 days and not 22 days as stated in the bankruptcy notice; and

(c) the calculation of the judgment interest from 1 January–21 December 2012 resulted in an excess over the correct amount, given that the JC had used a computation of 366 days instead of one year.

EVALUATION AND FINDINGS OF THIS COURT

Was service of the bankruptcy notice defective?

[3] Given the allegation of defective service, the starting point must plainly be the letter for service dated 7 January 2016 of the bankruptcy notice. This is exhibited as MFBR1 in the affidavit of service which was filed and affirmed by one Mohd Fahmi Roslan, a process server of the solicitors for the JC, on 22 January 2016 ('the affidavit of service').

[4] The JD asserted that the service was invalid since the bankruptcy notice must be personally served on the JD and no one else. The JD alleged that although there was a purported service of the bankruptcy notice on 21 December 2015, it was neither given to nor accepted by the JD personally. Instead, according to the JD, the bankruptcy notice was served on the JD's wife who had then signed the acknowledgement copy of the service. As the JD did not sign the acknowledgment of service, there was no perfect service of the bankruptcy notice. Further, the JD also highlighted that as bankruptcy proceedings are quasi-penal in nature, strict compliance with the relevant rules on service is paramount.

[5] It is well established that service of a bankruptcy notice must be effected by way of personal service. Rules 97 and 109 of the Bankruptcy Rules 1969

provide thus:

> 97 Service of notice
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> A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition.
>
> 109 Personal service
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> A creditor's petition shall be personally served and service shall be effected by an officer of the Court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor.

[6] It is equally imperative, considering the assertion made by the JD, that I should also refer to r 111 of the Bankruptcy Rules 1969 which reads as follows:

> 111 Proof of service
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> (1) Service of the petition shall be proved by affidavit.
>
> (2) The affidavit with a sealed copy of the petition annexed and referred to as an exhibit shall be filed in Court forthwith after service.

[7] As I mentioned earlier, the affidavit of service of the JC was affirmed and filed on 22 January 2016. The deponent, Mohd Fahmi Roslan, the process server for the JC clearly averred the following key points:

(a) on 21 December 2015 at 10.50am he went to the last known address of the JD, and after the JD identified himself as the JD and the deponent informing the JD that the bankruptcy notice had been issued against him, the deponent served the bankruptcy notice on the JD; and

(b) the JD then signed on the letter dated 7 December 2015, attaching the bankruptcy notice as well as stating the date and time of acceptance of service.

[8] The JD, on the other hand averred in his affidavit affirmed on 11 July 2016 that first, he denied signing on the said letter, and secondly the signature which did appear on the letter appears to resemble that of the JD's wife. Specifically he averred thus:

> ... Saya tidak menandatangani apa-apa Surat Peguam Pemiutang Penghakiman yang bertarikh 7 Disember 2015. Sebaliknya tandatangan yang tertera di dalam surat tersebut kelihatan seperti tandatangan isteri saya.

[9] The above averment was then disputed by the JC in its reply affidavit as affirmed by the process server on 2 August 2016.

[10] Despite the apparent conflict in the versions presented by the parties, it

is the duty of the court to examine whether the dispute raised by the JD is genuine and credible. Having evaluated the various affidavits, it is my view that the averments made by the JD are of doubtful validity. I say so for a number of reasons.

[11] First, despite the JC, through its process server having affirmed the requisite affidavit of service in adherence to r 111 and averred clearly the fact of service made on the JD in person, and evidenced by the signing of the acknowledgment copy, the reply made by the JD was lacking in specificity and too tentative. In other words, the averments in reply by the JD were not credible.

[12] The JD claimed that the signature was not his, and that it seemed more like his wife's. This averment, without more, cannot justifiably challenge the affidavit of service of the JC, for it failed to include the plain and obvious to avoid it being a bare averment, which is to have the same substantiated by an affidavit by the JD's wife to confirm that it was instead she who accepted and acknowledged service of the bankruptcy notice. Neither is there any explanation by the JD why such an affidavit could not be produced. The version of the JD disputing authorship of the signature is thus a bare averment that cannot be accepted.

[13] Secondly, a review of the averments contained in the affidavits of the JD affirmed on 11 July 2016 and 18 August 2016 (the latter in reply to the affidavit of the process server) show that there is in fact no denial or disputation by the JD that the process server had visited his home, or that he had met the JD. The JD instead merely focused on the identity of the person who signed the acknowledgment. To such extent, applying the trite rule in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, the averments by the process server on his meeting the JD at the latter's home must therefore be deemed admitted.

[14] More importantly, it should be stated that r 109 of the Bankruptcy Rules 1969 does not stipulate that it is mandatory that there must be evidence of actual physical acceptance of the creditor's petition or bankruptcy notice by a judgment debtor in the corporeal sense of the document having to be handed over to and received by the judgment debtor. Rule 109 does not define delivery by personal service. In the case of *AlliedBank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1; [1998] 2 CLJ 33, in discussing the manner of effecting personal service of a notice of demand, the High Court made reference to the *Supreme Court Practices* 1985 Vol 1 ('RSC') (at p 996) which stated the following:

> To effect personal service the clerk or other person entrusted with the task should first satisfy himself that he has found the right man. He should then hand to or leave

A with the person to be served a copy of the writ. If the person served will not take the copy, he should tell him what it contains and leave it as nearly in his possession or control as he can.

B **[15]** As such, a proper construction of r 109 does not, in my view, require actual physical personal service. In the case of *Re Lee Peak Sing: Ex p Malayan Banking Berhad (No 2)* [2012] MLJU 1784; [2012] 3 CLJ 351, the High Court held as follows:

C Rule 109 of the Rules stipulates that the CP shall be personally served on the JD. In this case, if the CP was not served personally on the JD, the JD would not have known about the hearing date of the CP, but he did. Besides, there is no requirement under r 109 of the Rules that the JD must sign and acknowledge receipt on the service copy of the CP. Hence, there was no issue of prejudice caused to the JD as regards to the service of the CP.

D **[16]** There is thus no necessity for a judgment debtor to sign and acknowledge receipt of service of the creditor's petition, or a bankruptcy notice for that matter. Further, a judgment debtor's knowledge of the bankruptcy notice by virtue of his action in opposing the same, and being represented in the relevant hearing meant that it had been served on him (in the sense at the very least of having been made aware of the bankruptcy notice) and that no prejudice had been caused to him.

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F **[17]** I have also made a similar ruling in *Siow Fook Keong v Lim Ean Chye* [2015] MLJU 931 where I found as follows:

G [15] In this appeal, the JD, although identified, confirmed to be at home, and verbally told of the petition, still refused to accept the same. But the law does not require that he acknowledged receipt of the petition. And given the factual circumstances, the law considers that the JD had been personally served with the petition. Furthermore, there is no prejudice to the JD since he had been told about the petition by the process server, as confirmed by the JD's subsequent conduct in seeking the aid of this court to set aside the petition. It is thus my finding that since r 109 of the Bankruptcy Rules 1969 has been adhered to and there was a valid personal service of the creditor's petition on the JD, it would be superfluous for the JC to invoke substituted service under r 110 of the Bankruptcy Rules 1969.

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[18] In the same case, I also surmised that it would be impractical for the law to insist that actual physical personal service must still be made on a judgment debtor who for no good reasons refuses to accept service despite being in the proximity of the process server, and already having been identified as well as informed by the process server about the issuance of the bankruptcy notice. I said thus:

I [16] It is also my view that a separate observation that can be made is that for policy reasons, it is arguably difficult to justify a different conclusion as to the scope of

personal service under r 109 given the situations like in the present appeal, where a judgment debtor could choose instead to deliberately refuse and frustrate service even when he was already in the general proximity and the line of sight of the person seeking to serve the creditor's petition on the judgment debtor. This can be distinguished from different factual situations justifying substituted service under r 110 which refers to the words 'keep out of the way to avoid service'. This could be more appropriately construed as situations where the judgment debtor evades service by being not traceable or found by the process server. I think this proposition is well in accord with the fundamental tenet of furthering the overriding interest of justice and efficiency in bankruptcy proceedings.

[19] In the instant case, the non-denial by the JD of the visit by the process server meant that he was aware of the bankruptcy notice as the same would have been told to him by the process server, as indeed the affidavit of service so averred. The fact that he argued that he did not sign the acknowledgement is thus immaterial, based on case-law authorities, as I have shown above. Even if it was true that the wife was the one who accepted service (which I already found to be not acceptable, in the absence of an affidavit affirmed by her), there is no rebuttal by the JD to even suggest that the wife did not, for whatever reasons, subsequently apprise the JD of the bankruptcy notice, more so since based on the JD's averment that his wife could have signed the acknowledgement meant that his wife is, as to be naturally expected, residing with him at the same address.

[20] In any event, even that would be insufficient to assist the JD, for there is also authority (such as in *Re Lee Peak Sing*) as I have alluded to earlier in this judgment, that the fact that the JD applied to set aside the bankruptcy notice meant that he had been made aware of the existence of the bankruptcy notice. As such, all arguments of the JD in respect of defective personal service of the bankruptcy notice are wholly unmeritorious and cannot be sustained.

Is the bankruptcy notice flawed due to wrong calculation of interest?

[21] The JD submitted that the bankruptcy notice is defective because the calculation of judgment interest stated therein is wrong.

[22] The first error, so argued by the JD, pertains to the computation of the 8% interest from 9 November–31 December 2009 which should have been calculated as a total of 53 days and not 22 days as stated in the bankruptcy notice.

[23] The JD submits on the authority of the Court of Appeal decision in *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177; [2000] 3 CLJ 104 whereby Gopal Sri Ram JCA (as he was then) stated:

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(1) When determining an issue under the Act, it is incumbent upon the court to accord its provisions a strict construction.

(2) The consequence of such an approach is that a bankruptcy notice that requires a debtor to pay a judgment debt otherwise that in accordance with the terms of the judgment is null and void ab initio.

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[24] The JD thus argued that the bankruptcy notice does not reflect the judgment dated 18 June 2012 for it is clearly stated in the judgment that the computation of the interest shall be:

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(b) faedah sebanyak 8% setahun dari tarikh pemfailan tindakan ini sehingga penyelesaian penuh.

[25] The JD took the position that the computation of interest in the bankruptcy notice is therefore wrong, confusing and does not reflect the correct computation of interest as stated in the judgment. The JD also adopted the stance that the JD does not have to issue any notice pursuant to s 3(2)(ii) of the Bankruptcy Act 1967 to the JC. Thus in, again, *J Raju a/l M Kerpaya*, Gopal Sri Ram JCA had also stated as follows:

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The appellant's complaint is not merely that the respondent in its bankruptcy notice mistakenly claimed more than what is actually due. The complaint is that the bankruptcy notice is not accordance with the judgment. It is a separate and distinct head of challenge under s 3(2)(i) of the Bankruptcy Act. It is a jurisdictional challenge because it is a condition precedent to the exercise of bankruptcy jurisdiction that a bankruptcy notice shall require the debtor to pay the judgment debt in accordance with the terms of the judgment on which it is founded.

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[26] In any event, it was argued that the bankruptcy notice is ambiguous and uncertain at best.

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[27] The JD further relied on the case of *Ghazali bin Mat Noor v Southern Bank Berhad and four other appeals* [1989] 2 MLJ 142 where the Supreme Court held the following:

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(i) for a bankruptcy notice to be valid it should state the exact amount due at the date of the bankruptcy notice. The judgment debtor must know the exact amount he has to pay to avoid bankruptcy. He does not have to make calculations or enquiries.

I

[28] The JD also referred to the case of *Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 1 MLJ 426, where the Supreme Court held that:

The sums required to be paid in both notices were ambiguous and uncertain resulting in the inability of the respondent bank to quantify them. We agree that the

defect was not a formal one or a mere irregularity that could be cured by s 131 of the Bankruptcy Act or by r 274. Both notice were void ab initio and non-compliance of this would not constitute an act of bankruptcy under s 3(1)(i).

[29] Is this argument strongly grounded in law? I do not think so. As I have examined in *Re Liew Choo; Ex p Chuah Teng Heng* [2016] MLJU 1836; [2016] 9 CLJ 598 and in *Salvarajoo a/l Palany v Export-Import Bank of Malaysia Berhad* [2015] MLJU 389; [2016] 3 MLRH 358, one must identify the nature of the objection of a debtor against the bankruptcy notice in order to ascertain if the correct procedure had been followed to challenge the bankruptcy notice. I had said thus:

[15] I should start by referring to the Court of Appeal decision in *J Raju M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104 which reiterates the point no less clearly in the judgment delivered by Gopal Sri Ram JCA (as he then was), the relevant parts of which are as follows:

1. When determining an issue under the Act, it is incumbent upon the court to accord its provisions a strict construction.

2. The consequence of such an approach to construction is that a bankruptcy notice that requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment founded is null and void ab initio. Hence, a debtor does not commit an act of bankruptcy if he makes default upon such a notice.

3. *A challenge on the ground that a bankruptcy notice requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment may be taken at any time after service of the notice.*

4. A debtor who seeks to set aside a bankruptcy notice on the ground that it requires him to pay a judgment debt otherwise than in accordance with the terms of the judgment, must make an application in that behalf in accordance with r 18 of the Rules.

5. A debtor who seeks to challenge the validity of a bankruptcy notice is also entitled to proceed under r 95 of the Rules. However, if he does so, he must show that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt which he could not set up in the action in which the judgment was obtained. Further, he must act within the time limit prescribed by s 3(1)(i) of the Act.

6. A debtor who seeks to challenge a bankruptcy notice on the ground that the amount specified therein exceeds the amount actually due, must act in accordance with proviso (ii) to s 3(2) of the Act. Hence, he must, within the time prescribed in the bankruptcy notice give notice in writing to the creditor that he disputes the validity of the notice on the ground that it mistakenly claims an amount larger than that lawfully due.

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7. A debtor who opposes a creditor's petition must comply with the procedure prescribed by r 117 of the Rules. If he does not do so, any challenge he may mount is liable to fail for non-compliance of the Rules. (Emphasis added.)

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[30] It is to be observed that the judgment of Abdul Hamid Mohamad J (later Chief Justice) in *Re Khaw Siew Suan; Ex p Asia Commersial Finance (M) Bhd* [2001] 1 MLJ 101 also provides a clear summary of *J Raju a/l M Kerpaya* as follows:

C

Sedang saya menulis alasan penghakiman ini, penghakiman Mahkamah Rayuan dalam kes *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* dilaporkan dalam [2000] 3 MLJ 117.

Penghakiman ini menjelaskan cara membantah sesuatu notis kebankrapan:

D

(a) seseorang penghutang yang berhak membantah mengenai keesahan suatu notis kebankrapan atas alasan bahawa dia mempunyai tuntutan balas, tolakan atau kena bayar balas yang jumlahnya sama banyak atau melebihi hutang penghakiman yang tidak boleh dibangkitkan dalam tindakan yang membawa kepada penghakiman itu, boleh melakukannya dengan memfail afidavit (Borang 7) mengikut k 95 dalam tempoh tujuh hari yang ditetapkan;

E

(b) seseorang penghutang yang hendak mencabar notis kebankrapan atas alasan bahawa jumlah hutang yang disebut dalam notis kebankrapan melebihi jumlah hutang sebenar hendaklah melakukannya dengan memberi notis kepada pemiutang penghakiman dalam tempoh tujuh hari yang ditetapkan itu — proviso (ii) s 3(2) Akta Kebankrapan 1967; dan

F

(c) seseorang penghutang yang hendak mencabar notis kebankrapan atas alasan-alasan lain termasuk alasan bahawa notis kebankrapan itu tidak mengikuti terma-terma penghakiman, boleh melakukannya dengan memfail saman dalam kamar di bawah k 18. Had masa tujuh hari itu tidak terpakai dalam permohonan ini.

G

[31] Further in *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304, Lee Hun Hoe CJ (Borneo) (as he then was), delivering the judgment of the Supreme Court, held as follows:

H

The respondent gave notice of intention to oppose petition but made no mention of any irregularity. It is fair to say that if one wants to challenge the validity of a bankruptcy notice one must give proper notice. We are unable, as the respondent urged us, to say that the bankruptcy notice is irregular and invalid and that the respondent has not committed an act of bankruptcy within the meaning of s 3(1)(c) of the Bankruptcy Act 1967 entitling the petitioning creditors to petition herein ...

I

[32] Should the JD have issued notice to dispute? The complaint by the JD is that the interest from 9 November–31 December 2009 should have been

calculated over 53 days but was wrongly done on 22 days instead. It is quite plain that there was indeed an error. The JC, in the affidavit of Sharmala AS Nathan, affirmed on 2 August 2016, merely responded that the calculation did not prejudice the JD. This must necessarily mean that the amount stated in the bankruptcy notice is indeed less that the amount actually due.

[33] As such, the nature of the challenge is neither that the amount ought to be set off against any counterclaim, set off or cross demand (requiring compliance with s 3(1)(i) of the Bankruptcy Act 1967) nor that the amount being claimed is in excess of the amount actually due (requiring compliance with s 3(2)(ii) of the Act). As such, the JD, in raising the instant complaint, is not subject to the requirement of giving notice disputing the bankruptcy notice to the JC within seven days of the service of the bankruptcy notice under s 3(1)(i) and (2)(ii) of the Bankruptcy Act 1967. The argument of the JC that the JD ought to have given notice within seven days after service of the bankruptcy notice is therefore untenable.

[34] But whilst the many cases cited by the JD are indeed relevant, neither can it be doubted that the JD cannot be validly said to have been prejudiced by the calculation error because the amount claimed in the bankruptcy notice is lesser than the amount that is actually due and supposed to be claimed. The JC is claiming a lesser sum. In my view, this error is a form of a formal defect or an irregularity that can validly attract the curative provisions of s 131 of the Bankruptcy Act 1967 for it is established law that not all forms of irregularities will justify the setting aside of a bankruptcy notice. Section 131 provides thus:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court.

[35] The essence of the kind of defects envisaged to be curable by this provision could be found in the following passage in the opinion of Lord Diplock, in delivering the decision of the Privy Council in *Rengasamy Pillai v Comptroller of Income Tax* [1970] 1 MLJ 233:

> What then is a 'formal defect or irregularity' within the meaning of the section? This was discussed in relation to a bankruptcy notice in *Re A Debtor; Ex p The Debtor v Bowmaker Ltd* [1951] 1 Ch 313 in which the earlier authorities were considered. The test there laid down was whether the defect in the notice was of such a kind as could reasonably mislead a debtor upon whom it was served. If it was, the notice was not validated by the section notwithstanding that the particular debtor upon whom it was served was not in fact misled. If on the other hand it could not reasonably mislead the debtor it was a formal defect and validated by the section.

[36] Section 131 is designed more to cure defects that would not mislead or

prejudice a debtor. In the instant case, the defect results in the claim for a lower amount that the JC could have claimed for. No prejudice, let alone substantial in nature, can truly be occasioned to the JD by the bankruptcy notice in such a situation.

[37] I find further support in this conclusion in the authority of the decision of the High Court of Singapore in *Re Lim Kim Guan, Ex p Four Seas Bank Ltd* [1991] 1 MLJ 330. Not unlike presently, in that case, there were errors in the calculation of interest, the net result of which was that there was an understatement of the interest demanded in the bankruptcy notice. After reviewing various Commonwealth authorities on the point, Thean J held as follows:

> That was a case of an over-demand in a bankruptcy notice and the court held that an over-demand was a substantive defect. Arguing by analogy, counsel submits that an under-demand in a bankruptcy notice is equally a substantive defect. In my opinion, that is not so and the analogy is not applicable. Where a creditor makes an over-demand in a bankruptcy notice, he is claiming what is never due to him. In the case of an under-demand or understatement of a judgment debt every cent that is demanded in the bankruptcy notice is due to the creditor, and the only question is whether such under-demand or understatement of the judgment debt is capable of misleading, embarrassing or perplexing the debtor concerned, and if it does not, s 133 of the Bankruptcy Act operates to validate the bankruptcy notice.

[38] Lest there be any doubt, it was also made clear that the bankruptcy notice can be cured without the necessity for the petitioner or judgment creditor to abandon the claim the shortfall in interest in order to make up for the understated sum. I can do no better that reproduce the discussion on the point by the learned High Court judge, as follows:

> On the same point, I find helpful two Australian decisions which counsel for the petitioners has brought to my attention. The first is a decision of the Full Court of New South Wales in *Re Farrugia, Ex p Deputy Commissioner of Taxation* (1988) 80 ALR 651. There, the bankruptcy notice claimed interest on the judgment debt to a date specified in the notice which was earlier than the date of issue of the notice but did not in terms waive or abandon any claim for interest accruing after the date so specified. It was held that the bankruptcy notice was not defective by reason only of the fact that it claimed part of the interest due and did not in terms waive or abandon any claim for interest accruing after the date specified in the notice. That passage of the judgment of Romer LJ (relied upon by counsel for the debtors) was considered, and the Full Court held that that passage and in particular the last two sentences thereof must be read in the context of the whole of his judgment and what was decided in that case. The Full Court said, at pp 657–658:
>
> > But if His Lordship meant that a bankruptcy notice must not only make clear what sum is to be paid in compliance with the notice, and that no further payment is required to secure compliance, but must also expressly abandon any future claim (as, for example, by proof of debt in a subsequent bankruptcy)

which the terms of the original judgment might enable the creditor to make, we must respectfully disagree. Vaughan Williams and Stirling LJJ laid down no such proposition, and we can see no basis for it in principle.

[39] The other case referred to by *Re Lim Kim Guan* is *Kleinwort Benson Australia Ltd v Crowl* (1988) 79 ALR 161; (1988) 165 CLR 71, a decision of the High Court of Australia, the Apex Court in Australia, where the bankruptcy notice, despite being understated by some $23,000 was remedied by virtue of the application of the s 306(1) of the Bankruptcy Act (Cth) which, similar to the Malaysian s 131, provides:

Proceedings under this Act are not invalidated by a formal defect or an irregularity unless the court before which the objection on that ground is made is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of that court.

[40] Of particular relevance are the following passages of the judgment of the High Court:

... Understatement of the amount due, whether it be an understatement of the judgment debt or of interest payable thereon, will thus constitute a defect which is substantive rather than formal only if the understatement is objectively capable of misleading the debtor as to what is necessary for compliance with the notice.

17. It may be that, in a given case, understatement is capable of misleading the judgment debtor particularly if the notice is capable of producing uncertainty as to whether the debtor is required to pay the amount in fact due or the amount specified in the notice. In such a case uncertainty arises, not merely from the understatement, but from the understatement in the context of the particular bankruptcy notice. No such uncertainty arises if it is clear that payment of the amount specified in the notice will constitute compliance with the notice.

[41] In the instant case, no uncertainty can be said to have arisen from the understatement in the context of the bankruptcy notice. The amount stated therein is in fact due. The understatement of the interest payable on the total amount actually due constitutes only a formal defect curable by s 131 of the Bankruptcy Act 1967 as it is not objectively capable of misleading, perplexing or prejudicing the JD as to what is necessary for compliance with the bankruptcy notice.

[42] Finally, the third ground submitted by the JD, or the second error contended to have been made by the JC in respect of the calculation of the judgment interest is that the calculation of judgment interest of 8%pa for the period of 1 January–31 December 2012 was wrong as JC should have considered 365 days instead of 366 days for the said calculation.

[43] I have, however, no hesitation in holding that the complaint is either too trivial or entirely misconceived since the month of February for 2012 had 29 days, or an extra, leap day. For argument sake, however, even if indeed it was an error, which it is plainly not, it would patently be a minor and mere formal defect, and one that would easily warrant the invocation of the curative provision s 131 of the Bankruptcy Act 1967.

CONCLUSION

[44] Accordingly, in my assessment, in view of the foregoing, it is palpably an inescapable a conclusion that the action by the JD to set aside the bankruptcy notice is plainly unmeritorious and cannot succeed.

[45] As such, the decision of the senior assistant registrar refusing the said application is hereby affirmed, and the appeal be dismissed.

Appeal dismissed, decision of senior assistant registrar affirmed.

Reported by Nisha Paran